1996

State of Utah v. Chadley Keith Calvert : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, v. CHADLEY KEITH CALVERT, Defendant and Appellant.	Case No. 960270-CA Priority No. 2

BRIEF OF APPELLEE

APPEAL FROM CONVICTION OF ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE, A CLASS A MISDEMEANOR IN VIOLATION OF UTAH CODE ANN.§ 58-37-8(2)(a)(i) (1996), AND POSSESSION OF A CONTROLLED SUBSTANCE, A CLASS A MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. §58-37-8(5)(a)(vii) (1996), IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE JAMES L. SHUMATE PRESIDING

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(f) (1996).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Does defendant's brief comply with the requirements of Anders and Clayton by adequately illustrating that defendant's claims have no merit?

Once the court determines that the required elements of an Anders brief are present, this Court will grant defendant's counsel's request to withdraw and will affirm the conviction only when the Court unanimously finds the issues presented are "wholly frivolous." State v. Clayton, 639 P.2d 168, 170 (Utah 1981).

2. Was defendant denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution?

A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law. State v. Ellifritz, 835 P.2d 170,175 (Utah App. 1992). The review of counsel's performance, however, is "highly deferential" to avoid second guessing counsel's performance "on the basis of an inanimate record." State v. Callahan, 866 P.2d 590, 593 (Utah App. 1993).

3. Was defendant denied due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

Claims based on a denial of due process are questions of law that the appellate court reviews de novo. State v. Adams, 830 P.2d 310, 312 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum A contains that texts of Utah Code Ann. §§ 58-37-8 and 58-37a-5 (1996).

STATEMENT OF THE CASE

The State charged defendant with possession of a controlled substance, cocaine, a second degree felony, possession of a controlled substance, marijuana, a class A misdemeanor, and possession of drug paraphernalia, a class B misdemeanor, in

violation of Utah Code Ann. §§ 58-37-8 and 58-37a-5 (1996) (R. 4-5). After the trial court denied defendant's motion to suppress evidence seized from defendant, defendant entered an unconditional guilty plea to possession of a controlled substance, a class A misdemeanor, and attempted possession of a controlled substance, a class A misdemeanor (R. 131-37). The court sentenced defendant to 45 days in the Washington County Jail (R. 311).

Unhappy with trial counsel's performance, defendant timely filed a pro se notice of appeal (R. 161). The State appointed current counsel to represent defendant in this appeal (R. 164). Defendant has not contacted his current counsel regarding this appeal and current counsel does not know defendant's whereabouts. Appellant's Brief at 5. Consequently, defendant's counsel is unaware of any specific basis upon which defendant wishes to pursue an appeal beyond a general dissatisfaction with his representation at trial. Id.

Defendant's counsel reviewed the transcript and found no non-frivolous basis upon which to appeal. Id. at 5-6. As a result, on December 19, 1996, defendant's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) and State v. Clayton, 639 P.2d 168 (Utah 1981) ("Anders

brief"). The State moved to strike the brief for failing to comply Anders and Clayton. This Court granted the State's motion. This brief is in response to defendant's counsel's corrected Anders brief.

STATEMENT OF THE FACTS

Acting on information garnered from three informants and their own corroborating observations, law enforcement officers arrested defendant after a pat-down search and subsequent search incident to arrest revealed contraband (R. 76).

On April 2, 1994, Officers Montanez and Wright were assisting St. George police during spring break festivities (R. 195). At approximately 9:30 p.m. the officers noticed three young men drinking beer near room 232 of the Motel 6 (R. 195-96, 218). The officers determined that the young men were juveniles and issued citations for consumption of alcohol by a minor (R. 196, 217). The juveniles bartered with the officers, exchanging information regarding drug transactions that had occurred earlier in the day for the dismissal of their citations (R. 196).

The juveniles informed the officers that earlier that day they had seen a blue 4x4 pickup truck (possibly a Dodge Dakota) with two men, slightly older than themselves, supplying and selling different types of drugs (R. 197, 219). The truck had

been in the parking lot of the Motel 6 earlier that evening and the juveniles expected the truck to return later and continue with drug transactions (R. 197). The transactions would take place either in room 232 of the Motel 6 or in the parking lot just below the room (R. 198, 219). The juveniles seemed well versed in street drug vernacular, bolstering their assertions that they knew the individuals engaged in drug transactions (R. 218).

The officers left the motel in order to procure a less conspicuous automobile (R. 199). When the officers returned to the Motel 6 at approximately 10:30 they discovered a blue 4x4 pickup parked perpendicularly to the parking spaces right below room 232, just as the juveniles predicted (R. 200, 220). The truck contained two people in the cab and two more people sitting in the back (R. 200). The truck was surrounded by several people who scattered upon the officer's arrival (R. 200, 220). The officers, as a result of the information given by the juveniles and the sudden scattering of people in the parking lot, concluded that this was the truck from which the informants told them drugs were sold (R. 200, 224).

The truck immediately left the parking lot (R. 201, 220). The officers directed a nearby Trooper to effectuate a traffic

stop of the truck because the officer's car did not have the necessary equipment to make the stop (R. 208, 214). The Trooper pulled the truck over noticing two violations. First, the truck's tires exceeded the periphery of the vehicle without the required mud flaps, and second the passengers were seated on the side rather than the truck bed (R. 259). While the Trooper warned the driver of the violations, the officers questioned defendant who was a passenger in the truck bed (R. 208-09, 260).

The officers informed defendant that they had received a tip that the individuals in the truck were selling drugs and asked defendant if he had any drugs in his possession (R. 213, 223-24). Defendant became nervous and repeatedly put his hands into his pockets even after the officers requested that he keep his hands in view (R. 209, 213, 214). Worried about their safety, the officers conducted a Terry pat-down search for weapons and discovered a knife concealed in defendant's clothing (R. 76, 255-56, 274-75). A subsequent search incident to arrest uncovered the drugs and drug paraphernalia from which the possession charges stem (R. 76).

Defendant moved the trial court to suppress the evidence seized during the search, arguing that the officers did not have reasonable suspicion to detain him (R. 40-41). The

trial court denied defendant's motion to suppress (R. 73-80). Defendant subsequently entered an unconditional guilty plea to attempted possession of a control substance, a class A misdemeanor and possession of a controlled substance, a class A misdemeanor (R. 130-37). Defendant was sentence to one year in the Washington County Jail and ordered to pay a fine of $925.00. The trial court stayed the sentence and placed defendant on three years probation, including 120 days of house arrest (R. 302).

On April 17, 1996, defendant determined that house arrest was unreasonable and voluntarily checked into the Washington County Jail and requested the court modify his sentence (R. 309-11). The court resentenced defendant to 45 days of jail time (R. 311).

Defendant timely filed his notice of appeal (R. 165). Defendant contacted his current counsel once from the Washington County Jail and once after his release from jail. Appellant's Brief at 5. Defendant alleged he had not received adequate representation from prior counsel but failed to detail any specific instances of deficient performance. Id. Defendant's counsel has had no further contact with defendant. Id.

SUMMARY OF THE ARGUMENT

Defendant's appellate counsel has fulfilled the requirements

for an Anders brief to the extent possible under the circumstances. Counsel's Anders brief contains an adequate factual summary and legal argument, supported with citations to relevant authority, to support his conclusion that defendant cannot make an argument on appeal that is not wholly frivolous. Before abandoning contact with his attorney, defendant did not articulate any specific basis for his appeal beyond a general dissatisfaction with trial counsel's performance. Therefore, current counsel can only speculate as to the deficiencies upon which defendant wishes to base this appeal.

Furthermore, defendant's appellate counsel correctly concludes that defendant received effective assistance of counsel. Defendant was represented by two attorneys. The existing record indicates that the performance of both those attorneys was objectively reasonable at all phases of the proceedings. Counsel can find nothing in the record to overcome the strong presumption that trial counsel adequately represented defendant. Thus, any argument that defendant received ineffective assistance of counsel must fail as wholly frivolous.

Finally, by entering an unconditional guilty plea, defendant waived all pre-plea constitutional violations. Nothing in the record supports nor does defendant allege that the unconditional

guilty plea was not voluntary. Consequently, any argument that defendant was denied due process is similarly wholly frivolous.

Thus, this Court should dismiss defendant's appeal and grant appellate counsel's motion to withdraw.

ARGUMENT

POINT I

DEFENDANT'S BRIEF COMPLIES WITH THE REQUIREMENTS OF ANDERS AND CLAYTON

Defendant's brief complies with the requirements for an Anders brief as set forth in State v. Clayton, 639 P.2d 168, 170 (Utah 1981). Clayton requires that an Anders brief contain the following information: "a statement of the facts, a description of the proceedings and the citation of pertinent authorities sufficient to permit this Court to fulfill its obligation . . . a stipulation describing the trial proceedings pertinent to each alleged error . . . certification that [counsel furnished indigent defendant with a copy of the brief] and . . . incorporat[ion], in as full detail as appropriate, any points the indigent has raised with counsel." Id.

Defendant's brief contains a fact statement and an adequate description of the proceedings. Appellant's Brief at 2-4. Counsel then sets forth the binding legal authority which

demonstrates that defendant does not have an appealable issue of any merit. Appellant's Brief at 4-7.

Counsel cannot fulfill the remaining requirements of Clayton because counsel does not know the current whereabouts of defendant and therefore cannot ascertain the exact basis upon which defendant wished to lodge his appeal. Appellant's Brief at 5. Counsel also cannot comply with the requirement of furnishing defendant with a copy of the brief or include arguments defendant wished to make. Consequently, defendant's counsel has complied with the requirements of Clayton to the extent possible.

POINT II

DEFENDANT'S APPELLATE COUNSEL CORRECTLY CONCLUDES THAT DEFENDANT RECEIVED OBJECTIVELY REASONABLE TRIAL REPRESENTATION AND EFFECTIVE ASSISTANCE OF COUNSEL

A claim based on ineffective assistance of counsel raised for the first time on appeal presents a question of law. State v. Callahan, 866 P.2d 590, 593 (Utah App. 1995). However, when reviewing counsel's performance, this Court must indulge in a "strong presumption" that counsel's performance fell within the "wide range of reasonable professional assistance." State v. Templin, 805 P.2d 182, 186 (Utah 1990) (quoting Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984)).

On the existing record, defendant cannot overcome the strong

presumption of reasonable representation because the trial record is devoid of any instances in which trial counsel deficiently represented defendant. In order to establish that counsel represented him ineffectively, defendant must overcome that strong presumption and show that "his counsel's representation fell below an objective standard of reasonableness, " and that, but for the identified omissions or acts of trial counsel that there, is a "reasonable probability" of a more favorable outcome. Strickland v. Washington, 466 U.S. 668, 688 and 694, 104 S.Ct. 2052, 2064 and 2068 (1984); State v. Ellifritz, 835 P.2d 170, 173 (Utah App. 1993).

Two attorneys represented defendant prior to conviction. The first attorney, David Maddox, represented defendant through the suppression hearing. Maddox moved to withdraw after defendant failed to maintain contact or pay for services rendered (R. 102-04). Defendant's second attorney, LaMar Winward, then entered an appearance and represented defendant through his guilty plea and sentencing (R. 108, 112, 115, 118, 120-21, 129-30, 149-50, 158).

Maddox' representation never fell below an objective standard of reasonableness. The sole issue in this case was the admissibility of the contraband uncovered during the search of

defendant. During the hearing on defendant's motion to suppress, Maddox cross examined the officers pointing out inconsistencies in their recollections of the type or color of the truck defendant was riding in immediately prior to the seizure and arguing that the truck did not fit the description provided by the juvenile informants (R. 215, 233, 262, 273).

After he convinced the court that the questioning of the truck's passengers exceeded the permitted scope of a legitimate traffic stop (R. 271-73), Maddox focused on whether the questioning of defendant and the other passengers was supported by reasonable suspicion (R. 232, 273). Maddox supported his argument to the trial court that the questioning was not supported by reasonable suspicion by directing the court to relevant authority (R. 234)(directing the court to State v. Case, 884 P.2d 1274 (Utah App. 1994) (holding police lacked reasonable suspicion to detain defendant's vehicle when acting on uncorroborated police bulletin) and State v. Johnson, 805 P.2d 761 (Utah 1991)(finding no reasonable suspicion that a car passenger committed a crime when officers believed car was stolen)).

After oral arguments on the motion to suppress the court believed the issue needed written memoranda from both sides

before the court could come to a decision (R. 273). Maddox timely submitted a written memorandum adequately supported with citations to pertinent authority (R. 83-97). Thus, Maddox effectively represented defendant and his conduct never fell below an objective standard of reasonableness.[1]

Defendant's second attorney, LaMar Winward, was similarly effective. Winward's role was limited to arranging defendant's plea bargain and representing defendant at sentencing (R. 295-96, 299-306, 309-11). Winward continued to represent defendant despite defendant's failure to maintain contact with him (R. 122, 129, 130, 291). Winward explained defendant's guilty plea to him and believed that defendant fully understood the plea (R. 136). Winward also carefully directed the trial court's attention to all relevant mitigating factors during the sentencing procedure (R. 300-01). In defendant's own words, Mr. Winward, "said it all" (R. 301). Ultimately, Mr. Winward succeeded in reducing a second degree felony, a third degree felony, and a class A misdemeanor to two class A misdemeanors.

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[1]Despite trial counsel's efforts, the court denied defendant's motion to suppress because it concluded that the officer's observations coupled with the tip from the informants provided reasonable suspicion for the officer's to question the truck's passengers (R. 73-80).

On this record, defendant cannot overcome the strong presumption of reasonable representation, and this court should find that trial counsel adequately represented defendant.

POINT III

DEFENDANT WAS NOT DENIED DUE PROCESS BECAUSE DEFENDANT VOLUNTARILY WAIVED ALL PRE-PLEA CONSTITUTIONAL VIOLATIONS

Defendant waived all pre-plea constitutional violations by entering an unconditional guilty plea. An unconditional guilty plea waives all appealable issues with the exception of the voluntariness of the guilty plea, including the trial court's denial of defendant's motion to suppress. State v. Sery, 758 P.2d 935, 937-38 (Utah 1988); State v. Jennings, 875 P.2d 566, 567 (Utah App. 1994). Defendant was adequately informed of his right to appeal upon conviction, his right to have the State pay for his appeal if defendant was indigent and his right to assistance of counsel on such appeal, as well as all other constitutional rights under the State and Federal Constitutions (R. 131-33). Defendant has not alleged nor does the record indicate that defendant did not voluntarily enter his guilty plea (R. 134). On the contrary, defendant clearly indicated that he entered the plea voluntarily. He was not coerced, threatened, or promised anything in return for his guilty plea (id). Thus, all

other issues are deemed waived.

CONCLUSION

Based on the forgoing arguments and defendant's Anders brief, this Court should unanimously conclude that defendant's arguments are wholly frivolous and without merit. As a result, this Court should dismiss defendant's appeal and grant his counsel's motion to withdraw.

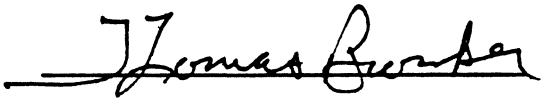
Respectfully submitted this 16th day of July, 1997.

Jan Graham
Attorney General

Thomas B. Brunker
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I have mailed by first class mail, postage prepaid, two true and correct copies of the forgoing Brief to DOUGLAS D. TERRY, 150 North 200 East, Suite 202, St. George, Utah, 84770, this 17th day of July, 1997.



ADDENDA

ADDENDUM A

(15) All costs associated with recording and submitting data as required in this section shall be assumed by the submitting drug outlet.

History: C. 1953, 58-37-7.5, enacted by L. 1995, ch. 333, § 3.

Effective Dates. — Laws 1995, ch. 333, § 4 makes the act effective on July 1, 1995.

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except that he may possess such controlled substances when they are prescribed to him by a licensed practitioner; or

(iv) possess a controlled or counterfeit substance with intent to distribute.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;

(iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this chapter and the use or possession is open, obvious, apparent, and not concealed from those present; however, a person may not be convicted under this subsection if the evidence shows that he did not use the

substance himself or advise, encourage, or assist anyone else to do so; any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense;

(iv) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance;

(v) for a practitioner licensed under this chapter knowingly and intentionally to prescribe, administer, or dispense a controlled substance to a juvenile, without first obtaining the consent required in Section 78-14-5 of a parent, guardian, or person standing in loco parentis of the juvenile except in cases of an emergency; for purposes of this subsection, a juvenile means a "child" as defined in Section 78-3a-2, and "emergency" means any physical condition requiring the administration of a controlled substance for immediate relief of pain or suffering;

(vi) for a practitioner licensed under this chapter knowingly and intentionally to prescribe or administer dosages of a controlled substance in excess of medically recognized quantities necessary to treat the ailment, malady, or condition of the ultimate user; or

(vii) for any person to prescribe, administer, or dispense any controlled substance to another person knowing that the other person is using a false name, address, or other personal information for the purpose of securing the same.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, or marijuana, if the amount is more than 16 ounces, but less than 100 pounds, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person previously convicted under Subsection (2)(b), that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction for possession of a controlled substance as provided in this subsection, the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction he is guilty of a third degree felony.

(f) Any person convicted of violating Subsections (2)(a)(ii) through (2)(a)(vii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person:

(i) who is subject to this chapter to distribute or dispense a controlled substance in violation of this chapter;

(ii) who is a licensee to manufacture, distribute, or dispense a controlled substance to another licensee or other authorized person not authorized by his license;

(iii) to omit, remove, alter, or obliterate a symbol required by this chapter or by a rule issued under this chapter;

(iv) to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter; or

(v) to refuse entry into any premises for inspection as authorized by this chapter.

(b) Any person convicted of violating Subsection (3)(a) shall be punished by a civil penalty of not more than $5,000. The proceedings are independent of, and not in lieu of, criminal proceedings under this chapter or any other law of this state. If the violation is prosecuted by information or indictment which alleges the violation was committed knowingly or intentionally, that person is upon conviction guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter;

(iv) to furnish false or fraudulent material information in any application, report, or other document required to be kept by this chapter or to willfully make any false statement in any prescription, order, report, or record required by this chapter; or

(v) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (4)(a) is guilty of a third degree felony.

(5) Prohibited acts E — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (5)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (5)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (5)(a)(i) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for parole until the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

(6) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(7) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

(8) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) (a) When it appears to the court at the time of sentencing any person convicted under this chapter that the person has previously been convicted of an offense under the laws of this state, the United States, or another state, which if committed in this state would be an offense within this chapter and it appears that probation would not be of benefit to the defendant or that probation would be contrary to the interest, welfare, or protection of society, the court, notwithstanding Section 77-18-1, may if there is compliance with Subsection (9)(b), impose a minimum term to be served by the defendant, of up to ½ the maximum sentence imposed by law for the offense committed. For violations of this section, this subsection supersedes Section 77-18-4.

(b) (i) Before any person may be sentenced to a minimum term as provided in Subsection (9)(a), the prosecuting attorney, or grand jury if an indictment, shall cause to be subscribed upon the complaint, in misdemeanor cases, or the information or indictment, in addition to the substantive offense charged, a statement setting forth the alleged past conviction of the defendant and specifically stating the date and place of conviction and the offense of which the defendant was convicted. The allegation shall be presented to the defendant at the time of his arraignment, or afterwards by leave of court, but in no event later than two days prior to the trial of the offense charged or the defendant's entering a plea of guilty. At the time of arraignment or a later date when granted by the court, the court shall read the allegation of the previous conviction to the defendant, provide him or his counsel with a copy of it, and explain to the defendant the consequences of the allegation under Subsection (9)(a). The allegation of the past conviction of the defendant is not admissible in a jury trial, except where the admissibility in evidence of a previous conviction is otherwise recognized as admissible by law.

(ii) The court, following conviction of the defendant of the substantive offense charged and prior to imposing sentence, shall inform the defendant of its decision to impose a minimum sentence under Subsection (9)(a) and inquire as to whether the defendant admits or denies the previous conviction. If the defendant denies the previous conviction, the court shall afford him an opportunity to present evidence showing that the allegation of the past conviction is erroneous or the conviction was lawfully vacated or the defendant was pardoned. The evidence shall be made a matter of record. Following the evidence, the court shall make a finding as to whether the defendant has a previous conviction, which finding is final, except for a showing of abuse of discretion. Following the findings by the court, the defendant shall be sentenced under Subsection (9)(a) or under the appropriate penalty provided by law, as the court in its discretion determines.

(c) Any person sentenced on a second offense to probation who violates that probation is subject to Subsections (9)(a) and (9)(b).

(d) For violations of this section, Subsection (9) supersedes Section 76-3-203.5.

(10) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(11) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(12) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(13) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

History: L. 1971, ch. 145, § 8; 1972, ch. 22, § 1; 1977, ch. 29, § 6; 1979, ch. 12, § 5; 1985, ch. 146, § 1; 1986, ch. 196, § 1; 1987, ch. 92, § 100; 1987, ch. 190, § 3; 1988, ch. 95, § 1; 1989, ch. 50, § 2; 1989, ch. 56, § 1; 1989, ch. 178, § 1; 1989, ch. 187, § 2; 1989, ch. 201, § 1; 1990, ch. 161, § 1; 1990, ch. 163, § 2; 1990, ch. 163, § 3; 1991, ch. 80, § 1; 1991, ch. 198, § 4; 1991, ch. 268, § 7; 1995, ch. 284, § 1.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, added the last sentence in Subsection (9)(a) and rewrote Subsection (9)(d) which read "Nothing in this section in any way limits or restricts Sections 76-8-1001 and 76-8-1002."

Cross-References. — Cities and towns, prohibitions of sales of narcotics to minors, § 10-8-47.

Psychotoxic chemical solvents, penalties for use or sale, § 76-10-101 et seq.

Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

NOTES TO DECISIONS

ANALYSIS

History: L. 1981, ch. 76, § 4.
Cross-References. — Expert witnesses, Rules of Evidence, Rule 702 et seq.

58-37a-5. Unlawful acts.

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

History: L. 1981, ch. 76, § 5.
Meaning of "this act." — The term "this act" means Laws 1981, ch. 76, §§ 1 to 6, which enacted §§ 58-37a-1 to 58-37a-6.

Cross-References. — Sentencing for felonies, §§ 76-3-201, 76-3-204, 76-3-301.
Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

NOTES TO DECISIONS

ANALYSIS

Intent.
Search and seizure.
Cited.

Intent.

Where the buyer of drug paraphernalia only intended to use the items as evidence in a subsequent criminal prosecution of the seller, it was factually and legally impossible for the defendant to have known that items sold would be used for illegal purposes. State v. Murphy, 674 P.2d 1220 (Utah 1983).

Search and seizure.

The smell of marijuana emanating from a private residence provides law enforcement officials with probable cause to conduct a search of the premises. State v. South, 885 P.2d 795 (Utah Ct. App. 1994).

Although the plain smell doctrine provides officers probable cause to believe contraband or evidence of a crime may be found, it does not automatically provide officers with exigent circumstances justifying a warrantless search of a private residence. State v. South, 885 P.2d 795 (Utah Ct. App. 1994).

Cited in State v. Keitz, 856 P.2d 685 (Utah Ct. App. 1993).

58-37a-6. Seizure — Forfeiture — Property rights.

Drug paraphernalia is subject to seizure and forfeiture and no property right can exist in it.